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No. 90-1594

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STEVEN LUNDBLAD,

Petitioner,

v.

RICHARD F. CELESTE; DOROTHY SHOEMAKER; WILLIAM NAPIER; and DONALD OLSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Where all circuit courts which have addressed the issue have held that considerations of political patronage are permissible when state officials decide whether to award a service contract to an independent contractor, did not the court below properly recognize a qualified immunity under *Harlow v. Fitzgerald* when it ruled to dismiss an action filed by a disappointed bidder who was allegedly denied a service contract in April, 1983, on the basis of political affliation, under 42 U.S.C. §1983 et seq. and the First and Fourteenth Amendments to the Constitution.

II. Where neither a property right to the award of a service contract under state law, nor the inadequacy of state post-deprivation remedies were clearly established in April, 1983, did not the court below properly recognize a qualified immunity under *Harlow v. Fitzgerald* when it ruled to dismiss an action filed by a disappointed bidder under 42 U.S.C. §1983 et seq. and the Fourteenth Amendment to the Constitution.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are Petitioner Steven Lundblad and Respondents Richard F. Celeste, Dorothy Shoemaker, Executor of the Estate of Myrl Shoemaker, William Napier and Donald Olson. Petitioner has waived all claims earlier asserted against the State of Ohio, Department of Natural Resources and Ronald James (Petition, p. 8, fn.1).

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II. The State Officials were entitled to qualified immunity under *Harlow v. Fitzgerald* because Petitioner failed to demonstrate that he enjoyed a clearly established substantive property right under Ohio law; coupled with his inability to identify any defect in Ohio's post-deprivation remedies, the Sixth Circuit's refusal to entertain his Due Process claims was correct. 12

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Ohio Revised Code 1501.09 (Page's 1986)*:

> The public service facilities mentioned in section 1501.07 of the Revised Code may be leased by the department of natural resources for the operation thereof as provided in section 1501.10 of the Revised Code, or may be operated by any person, firm, partnership, association, or corporation under contract with the director of natural resources as provided in section 1501.091 [1501.09.1] of the Revised Code, or may be operated by the department through the division of parks and recreation.

STATEMENT OF THE CASE

A. Factual Background

In May of 1983, Petitioner filed suit in federal district court against five employees of the State of Ohio ("State Officials") seeking substantial compensatory and punitive damages against each of them personally for alleged violations of 42 U.S.C. §§ 1983 et seq. No injunctive relief was sought. Petitioner's constitutional injuries were alleged to have occurred because the State Officials decided to solicit bids for a concession operation of the Punderson State Park Golf Course in Geauga County, Ohio, and ultimately rejected all bids and self-operated the golf course.

Petitioner had operated the golf course under a bid concession contract with the State of Ohio for several years preceding the Spring, 1983 season. This contract had expired and was not subject to renewal under controlling provisions of Ohio law (O.R.C. 1501.10, Petition, p.4). In his complaint, Petitioner alleged that he submitted the "best bid" for the concession and that the tentative selection of Petitioner's

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* Ohio Revised Code 1501.09 is here set forth as it was in effect in April, 1983. It has since been amended in respects not pertinent to this litigation.

business competitor as the apparent awardee of the concession contract was based solely upon partisan politics and patronage considerations. Petitioner filed suit against the State of Ohio on April 3, 1983, in the Court of Common Pleas of Franklin County, Ohio, seeking to enjoin the State's anticipated award of the concession contract to his business competitor. Petitioner did not seek a mandatory injunction compelling the award of the contract to himself. The competitor withdrew his bid; the State rejected all other bids, including Petitioner's; and the State Officials proceeded to self-operate the golf course as was their express statutory right in accordance with O.R.C. 1501.09.

B. Proceedings Below

Petitioner filed suit in the United States District Court, Southern District of Ohio, Eastern Division in May, 1983, alleging that the State Officials had violated his rights under the First and Fourteenth Amendments by arbitrarily denying him the contract to operate the golf course.* The district court granted the State Officials' motion to dismiss on res judicata grounds (based on the judgment rendered by the Ohio court of common pleas in Petitioner's state court action). On appeal, the Court of Appeals for the Sixth Circuit reversed the res judicata decision and remanded.

Upon remand to the district court, the State Officials moved to dismiss on the grounds that in April, 1983, it was not clearly established that consideration of political affiliation was impermissibie in the selection of an independent contractor. The State Officials sought qualified immunity under this Court's ruling in *Harlow v. Fitzgerald,* 475 U.S. 800 (1982). This motion was denied. On appeal, all three members of the circuit court panel agreed with the State Officials that *Harlow* applied and that Petitioner's claim as it related to his allegation that his First Amendment rights of freedom of association should be dismissed. Two judges held that *Harlow* protected the State Officials from Petitioner's Due

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*Petitioner does not claim to be a member of any discrete and insular class customarily associated with equal protection considerations.

Process claim, but that it did not extinguish his equal protection cause of action; the dissenter held that *Harlow* did defeat Petitioner's Due Process claim but not his equal protection cause of action.

On rehearing en banc, all of the fourteen judges of the Sixth Circuit unanimously agreed that Petitioner's claims under the First Amendment and Equal Protection Clauses should be dismissed because it was not clearly established in April, 1983 that considerations of political affiliation were impermissible in the selection of an independent contractor, and *Harlow* immunity applied. Twelve of the judges agreed that the same principles defeated Petitioner's claim under the Due Process Clause, and two judges dissented from only this aspect of the ruling.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals en banc ruling, which dismissed the case under *Harlow v. Fitzgerald* because it was not clearly established in April, 1983, that state officials were prohibited from refusing to award a service contract to an independent contractor on the basis of political affiliation, is consistent with all existing precedent.

In a case such as this where government employees are sued personally for monetary damages, and the plaintiff does not seek any injunctive relief, this Court has consistently recognized the chilling effect such burdensome litigation can produce upon civil servants. Thus, the Court established appropriate protection for government employees, and has declared that a need for a qualified immunity for government officials is vital to the function of government. In *Scheurer v. Rhodes,* 416 U.S. 232 (1974), the former governor of Ohio and various other state employees were sued under 42 U.S.C. § 1983 by the estates of students who were killed at Kent State. In determining that the governor was entitled to qualified immunity, the Court stated:

> Implicit in the idea that officials have some immunity - absolute or qualified - for their acts, it is recognized that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Id., at 242. The Court further found that public officials who failed to act or make necessary decisions due to the threat of personal liability cannot fully and faithfully perform their duties. *Id.*

The need for qualified immunity to protect officials who exercise discretionary functions was emphasized by the Court in *Wood v. Strickland,* 420 U.S. 308 (1975). In that case, several high school students who were expelled from school for serving "spiked" punch brought a 42 U.S.C. §1983 action against various school officials. In determining the scope of immunity afforded the officials, the Court looked to the potential liability of the defendants and the chilling effect refusal to grant immunity could have in school boards across the country:

> The imposition of monetary costs for mistakes which were not unreasonable in light of all the circumstances would undoubtedly deter even the most conscientious decision maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources for monetary liability were a likely prospect during their tenure [Footnote omitted].

Id. at 319, 320.

Finally, in *Harlow*, the Court established a clear standard for granting qualified immunity to those who exercise discretionary functions. Justice Powell, writing for the Court,

declared that:

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> * * * * * * * *
>
> If the law at that time was not clearly established, an officials could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. at 817-818.

The Petition is utterly devoid of reference to *Harlow* or discussion of its application to the case at bar. Considering that *Harlow* is the basis of the State Officials' defense to this action and the major focus of the Sixth Curcuit's decision, omission of *Harlow* is inexplicable.

Furthermore, Petitioner does not cite even one single case which holds that political affiliation is an impermissible criterion in the selection of an independent contractor, nor does Petitioner cite the well-established circuit court precedent which contradicts this proposition — precedent which the State Officials have repeatedly cited in numerous briefs and memoranda filed in the eight years of this litigation. Every circuit which has spoken on the subject has concluded that the holdings of *Elrod v. Burns,* 427 U.S. 374 (1976) and *Branti v. Finkel,* 445 U.S. 507 (1980) do not extend to the context of selection of an independent contractor, and that

refusal to contract or even termination of an existing contract on the basis of political affiliation will not support an independent contractor's pursuit of relief under 42 U.S.C. §1983. Such was the settled state of the law in April, 1983, when the State Officials made the decision which spawned this lawsuit.

In *Sweeney v. Bond,* 669 F.2d 542 (8th Cir.), *cert. denied,* 459 U.S. 878 (1982), the court allowed the Republican officials of the State of Missouri to fire Democrat internal revenue fee agents. The court upheld a district court finding that the fee agents were not public employees and concluded that they were "not protected from dismissal because of their political affiliations". *Id.* at 546. In *Fox & Co. v. Schoemel,* 671 F.2d 303 (1982), the Eighth Circuit reaffirmed the principles of *Sweeney v. Bond* and held that an accounting firm hired by the City of St. Louis, Missouri, to audit books and records did not enjoy the protection established for public employees in *Elrod* and *Branti* and could be dismissed solely because of political affiliation notwithstanding a valid contract.

On the heels of the Eight Circuit's holding in *Fox & Co.,* and just weeks after the State Officials made the decision put at issue by Petitioner, the Seventh Circuit issued its decision in *LaFalce v. Houston,* 712 F.2d 292 (7th Cir. 1983). In *LaFalce,* plaintiff submitted a bid to install and maintain benches along the streets of the City of Springfield, Illinois. Like Petitioner, plaintiff claimed his bid was most favorable to the contracting authority but was rejected solely because his competitors were political supporters of the incumbent and plaintiff was not. In rejecting plaintiff's First Amendment claim, the court refused to extend *Elrod* and *Branti* to independent contractors and declared:

> We are reluctant to tamper with political institutions when the competing First Amendment interests are as attenuated as they appear to be here.
>
> A practical consideration reinforcing our caution is that a decision upholding a First Amendment

> right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser. Civil service laws protect many public employees from being discharged; but it is in the nature of competitive bidding that every award of a contract involves the rejection of one or more other bids, each of which could form the basis of a federal suit under the theory advanced by the plaintiff in this case.
>
> We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of *Elrod* and *Branti*. As the Eight Circuit pointed out in *Sweeney v. Bond, supra* 669 F.2d at 542, 545, the plurality opinion in *Elrod,* after noting that 'the general practice of political patronage' includes making 'nonofficerholders . . . the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies,' states: 'Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reason.' 427 U.S. at 353, 96 S.Ct. at 2680.
>
> Some day the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough differences in the strength of the competing interests in the two classes of cases to persuade us not to attempt to do so.

Id., at 294, 295.

Finally, in *Horn v. Keane,* 796 F.2d 668 (3rd Cir. 1986), the Third Circuit flatly declared that New Jersey motor vehicle agents were independent contractors who were not insulated by the First Amendment from being replaced by the governor's successor who was of a different political party.

II. The State Officials were entitled to qualified immunity under *Harlow v. Fitzgerald* because Petitioner failed to demonstrate that he enjoyed a clearly established substantive property right under Ohio law; coupled with his inability to identify any defect in Ohio's post-deprivation remedies, the Sixth Circuit's refusal to entertain his Due Process claims was correct.

The absence of any clearly established substantive right to contract for the golf course concession was fatal to Petitioner's due process claims and supported dismissal of the complaint or *Harlow* grounds. It is equally compelling that Petitioner's inability to demonstrate any fault with Ohio's post-deprivation remedies protected the State Officials from his substantive due process attack. Thus, qualified immunity under *Harlow* serves to defeat the entirety of Petitioner's due process claims.

The Sixth Circuit merely assumed, but did not decide, that Petitioner was possessed of a property interest in the evaluation of his bid. The court then reasoned that regardless of the existence of any such right, Petitioner's claim under the Due Process clause would fail "because Ohio judicial remedies are perfectly adequate and provide all the process that is due." Petition, p.A.31. The Sixth Circuit's "assumption" that Petitioner possessed a property interest under Ohio law is in conflict with its own decisions and incorrect. This disputed assumption is insufficient to support certiorari to review Petitioner's procedural Due Process contentions — which are themselves fatally flawed. However, despite the court's erroneous "assumption", it did reach the correct conclusion and did not create bad law in the process.

An examination of and the law of the Sixth Circuit and the law of Ohio relating to bidders for contracts with public authorities illustrates the flaws in the Sixth Circuit's "assumption" and Petitioner's complaint. The law in the Circuit in April, 1983, clearly indicated that a bidder possessed no constitutionally protected property interest.

The action of officials of the City of Sterling Heights, Michigan, in 1982, who rejected all bids for a landscape contract, was insufficient to establish a substantive property interest and resulted in dismissal of plaintiff's 42 U.S.C. §1983 cause of action in *Kasom v. City of Sterlilng Heights,* 600 F.Supp. 1555 (E.D.Mich.1985), *aff'd mem.* 785 F.2d 308 (6th Cir. 1986).

In *Coyne-Delaney Co. v. Capital Development Bd.,* 616 F.2d 341, (7th Cir. 1980), the Seventh Circuit rejected Plaintiff's due process and equal protection claims and approved Illinois' supply contract bidding specifications which totally excluded plaintiff from consideration. The court stated that "A bidder on a government contract has no legally enforceable right against the award of the contract to a competitor other than those the government has seen fit to confer." *Id.* at 342. Ohio has not conferred any such right upon concession bidders and indeed specifically reserved the right to self-operate. O.R.C. 1501.09, p. 1. Under *Harlow,* qualified immunity shielded the State Officials from personal liability in deciding to self-operate.

Consistent with this analysis is the holding of *Cincinnati Electronics Corp. v. Kleppe,* 509 F.2d 1080 (6th Cir. 1975), where the Sixth Circuit declared that general competitive bidding statutes do not confer property rights upon bidders for public contracts. This Court has also recognized the general proposition that, absent specific statutory provisions, general competitive bidding statutes do not confer vested rights of any kind upon bidders for public contracts. *See, e.g., Perkins v. Lukens Steel Corp.,* 309 U.S. 643 (1940). Because Petitioner's cause of action hinges upon a general competitive bidding statute which expressly authorizes self-operation and has no specific provision giving participants in the bidding process the right to seek damages as a consequence of alleged irregularities in contract award, the State Officials did not deprive Petitioner of any constitutional right in rejecting all bids and deciding to self-operate the Punderson State Park Golf Course.

A more recent Sixth Circuit decision reaffirms the principle

The court rejected claims raised under the First, Fifth and Fourteenth Amendments and also refused to extend *Elrod* and *Branti* to independent contractors. Today, none of the circuits have undertaken to extend *Elrod, Branti* or *Rutan v. Republican Party of Illinois,* 110 S.Ct. 2729 (1990), beyond public employees and into the sphere of independent contractors.

Elrod and *Branti* are the two Supreme Court cases circa 1980 in which political affiliation is addressed. Both of these cases are limited to firings of public employees, and neither encompasses independent contractors. *Sweeney v. Bond, Fox & Co. v. Schoemel, LaFalce v. Houston,* and *Horn v. Keane* are the only circuit level cases which concern independent contractors, and in every case the court declared that considerations of political affiliation are permissible in this context. Accordingly, it was not clearly established in April, 1983, that patronage considerations were improper in the selection of an independent contractor; indeed, the settled state of the law indicates that such considerations were consummately permissible then, and they continue to be permissible today. Therefore, the State Officials were well within the ambit of qualified immunity established in *Harlow,* and the Sixth Circuit's en banc holding to this effect is patently correct.

Recently, in *Rutan,* a majority of the Court extended the principles of *Elrod* and *Branti* to hirings, promotions, transfers and recall rights of public employees. The *Rutan* dissenters argued that *Elrod* and *Branti* were wrongly decided and should not be extended beyond their facts, and in support of the arguments of the dissent Justice Scalia emphatically underscored the lack of guidance the "appropriate requirement" standard established in *Branti* provided to government officials trying to avoid 42 U.S.C. §1983 liability in the years following *Branti:*

> A few examples will illustrate the shambles *Branti* has produced. A city cannot fire a deputy sheriff because of his political affiliation, but then again perhaps it can, especially if he is called the 'police

> captain.' A county cannot fire on that basis its attorney for the department of social services, nor its assistant attorney for family court, but a city can fire its solicitor and his assistants, or its assistant city attorney, or its assistant state's attorney, or its corporation counsel. A city cannot discharge its deputy court clerk for his political affiliation, but it can fire its legal assistant to the clerk on that basis. Firing a juvenile court bailiff seems impermissible, but it may be permissible if he is assigned permanently to a single judge. A city cannot fire on partisan grounds its director of roads, but it can fire the second in command of the water department. A government cannot discharge for political reasons the senior vice president of its development bank, but it can discharge the regional director of its rural housing administration.
>
> The examples could be multiplied, but this summary should make obvious that the 'tests' devised to implement *Branti* have produced inconsistent and unpredictable results. That uncertainty undermines the purpose of both the nonpatronage rule and the exception. [Footnotes omitted.]

Id., at 2756-2757. Justice Scalia's observation, in 1990, of the varying interpretations given to *Elrod* and *Branti* illustrates the general confusion stimulated by patronage considerations in the context of government employees pre-*Rutan*. In the post-*Branti* decisions and in the course of the *Rutan* decision itself bitter conflict among learned jurists has resulted from efforts to apply the standard articulated in *Branti*. The very existence of such deeply divided thought and opinion in an area where the Court has spoken certainly substantiates the correctness of the Sixth Circuit's holding in an area where the Court has remained silent. The state of the law in April, 1983, called for application of *Harlow* immunity in this case because Petitioner had no clearly established constitutional right to operate the Punderson State Park Golf Course in April, 1983.

Rutan is not in conflict with the decision reached below. Indeed, citing *Elrod, Branti* and *Rutan,* the Sixth Circuit en banc in the case at bar held:

> . . . the Supreme Court has developed principles under the First Amendment prohibiting the hiring and firing of employees on a partisan political basis, but the Court has not developed such principles under the Equal Protection Clause, nor has it extended these First Amendment principles to the area of public contracts. It has not decided a case holding that the award of public contracts on the basis of political patronage violates either equal protection or the First Amendment. Thus there is no law developed in the Supreme Court that could be said to 'clearly establish' the principle of equal protection proposed by the plaintiff in this case.

(Petition, p. A.45). This holding is consistent with the unanimity among the circuits which have addressed the subject of patronage considerations in the context of independent contractors. Denial of the golf course concession contract to an independent contractor, allegedly due to patronage considerations, did not violate any clearly established constitutional rights enjoined by the Petitioner in April, 1983, when the State Officials' decision was made. Moreover, there is no substantive entitlement to contract with the State enjoyed by Petitioner to which any constitutional right could attach.

Conspicuous by its absence from Petitioner's brief is any reference to O.R.C. 1501.09,* which expressly authorizes the Ohio Department of Natural Resources to lease, contract, or self-operate facilities such as the Punderson State Park Golf Course. None of the Ohio Revised Code statutes in any way limit the ability of the Ohio Department of Natural

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*O.R.C. 1501.09, as in effect in 1983, appears at P.1 of this brief. Later amendments to this statute are omitted.

Resources to reject all bids, nor do any of these statutes require a contract in lieu of self-operation. The Ohio laws establish that contracting for concession operation of public service facilities is permissive, not mandatory.

This particular case for which Petitioner now seeks review is singularly ill-suited to the task of extending the holdings of *Elrod, Branti* or *Rutan* to the context of independent contractors. Primarily this is because it was not necessary for the lower courts to reach or rule upon the issue of whether political affiliation is a permissible criterion in selection of independent contractors; instead, the task of the lower courts was to decide whether the State Officials would be personally liable for monetary damages for a decision made in April, 1983, concerning operation of the Punderson State Park Golf Course. Accordingly, the Sixth Circuit en banc properly confined its review to this question: whether the State Officials, in making the decision to self-operate the golf course in April, 1983, violated any clearly established statutory or constitutional right enjoyed by Petitioner; or whether they were entitled to the qualified immunity established in *Harlow v. Fitzgerald*. The Sixth Circuit expressed no opinion on whether considerations of political affiliation are constitutionally permissible in selecting an independent contractor; instead, it properly confined its holding to the narrow question framed by Petitioner at the early stages of this litigation.

The appellate court's decision was complete and adequate, and it disposed of the case on the narrower ground of whether *Harlow v. Fitzgerald* entitled the State Officials to immunity. The court, confined to the historical question of whether political affiliation was a permissible criterion in April, 1983, did not explore that question in the context of any prospective activities, and the Court's restraint in refusing to generate dicta relative to the underlying issue was properly exercised.

that a bidder on a public contract does not possess a substantive property interest of constitutional magnitude. In *Riverview Investments v. Ottawa Community Improvement Corp.*, 769 F.2d 324 (6th Cir. 1985), the plaintiff contended that it was deprived of a fundamental property right when the defendant denied its application for industrial revenue bonds. In establishing that a property interest did not exist, the court noted that an enforceable claim of entitlement must be derived from "a statute or legal rule or through a mutually explicit understanding." *Id.* at 327, quoting *Leis v. Flynt*, 439 U.S. 438 (1979). Moreover, a protected property interest must be based on more than a subjective need, desire or expectation of receiving a benefit; rather, it must be based on a legitimate claim of entitlement that is created from a source independent of the Constitution, such as a state law. The court looked to Ohio law which made the issuance of bonds discretionary, and found that the plaintiff did not have a legitimate claim of entitlement. The authority relied upon by plaintiff in *Riverview* derived from a provision of the Ohio constitution which makes issuance of bonds discretionary. The statute of import in the case at bar also states that operation of concessions *may* be operated by contract or state employees is discretionary. O.R.C. 1501.09, p. 1.

Similarly, there is no Ohio law giving a right to be granted a state park concession contract. Nowhere on this subject has the Ohio Supreme Court or any Ohio court of lesser stature held that competitive park concession bidding statutes confer a property right upon disappointed bidders for public contracts; nor does Ohio law make the contracting agency or official liable in damages to the disappointed concession bidder. Petitioner's mere disappointment does not create a constitutional deprivation, consistent with this Court's decision in *Perkins v. Lukens Steel Corp., supra.*

In April, 1983, O.R.C. 1501.09 stated:

> *The public service facilities* mentioned in section 1501.07 of the Revised Code may be leased by the department of natural resources for the operation thereof as provided in section 1501.10

> of the Revised Code, or may be operated by any person, firm, partnership, association, or corporation under contract with the director of natural resources as provided in section 1501.091 of the Revised Code, or *may be operated by the department through the division of parks and recreation.* (p. 1; emphasis added.)

Under this authority, the State Officials enjoyed an absolute right to self-operate the Punderson State Park Golf Course in April, 1983. It was not clearly established in April, 1983, that a disappointed bidder on a concession contract enjoyed substantive due process rights. No opinion of the Supreme Court or the Sixth Circuit recognized any such right. Indeed, in April, 1983 when the action of the State Officials was taken, there was significant disagreement among the federal courts as to whether a bidder on a government contract enjoyed any constitutionally protected property interest. Compare *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir.1985); *Teleprompter of Erie, Inc. v. City of Erie*, 537 F.Supp. 6 (W.D.Pa.1981); *Kendrick v. City Council of Augusta, Ga.*, 516 F.Supp. 1134 (S.D.Ga. 1981); and *Three Rivers Cablevision v. City of Pittsburgh*, 502 F.Supp. 1118 (W.D.Pa.1980) (all recognizing the possibility that such a property interest can exist) with *Coyne-Delaney Co. v. Capital Dev. Bd., supra; Sowell's Meats & Servs., Inc. v. McSwain*, 618 F.Supp. 140 (D.S.C.1985), *aff'd.*, 788 F.2d 226 (4th Cir.1986)(per curiam); *ARA Servs., Inc. v. School Dist. of Philadelphia*, 590 F.Supp. 622 (E.D.Pa. 1984); *J.P. Mascaro & Sons, Inc. v. Township of Bristol*, 497 F.Supp. 625 (E.D.Pa.1980); and *Estey Corp. v. Matzke*, 431 F.Supp. 468 (N.D.Ill. 1976)(all doubting the existence of such a property interest). This disagreement itself supports a finding that Petitioner did not enjoy any clearly established property right under the due process Clause.

Starting in 1981 with *Parratt v. Taylor*, 451 U.S. 527 (1981), and followed in 1982 by *Logan v. Zimmerman Brush Co.*, 450 U.S. 909 (1982), this Court moved to stem the tide of property cases coming into the federal courts on due process grounds by ruling that a deprivation of property under color

of state law, which was not readily curable by the implementation of pre-deprivation procedures, did not constitute a deprivation of property without procedural due process so long as the state provided an adequate post-deprivation remedy, such as a statutory or common law cause of action for conversion. In *Hudson v. Palmer,* 408 U.S. 517 (1984), this Court was ultimately to hold that even intentional property deprivations in violation of state or federal law cannot by their nature be remedied by pre-deprivation procedures, and accordingly do not violate procedural due process if the state provides an adequate post-deprivation remedy.

Under these cases it stands to reason that even if Ohio law had created a property interest in Petitioner's favor, no deprivation of procedural due process can be said to have occurred because Ohio law provided Petitioner with various adequate post-deprivation remedies. For example, Petitioner could have availed himself of action in the Ohio Court of Claims which, by statute, has full equitable and legal powers over suits within its jurisdiction. Another available remedy was an injunction action or a mandamus action in Ohio's common pleas courts, which have full equitable and legal powers to resolve controversies properly brought before them, *State ex rel. Heimann v. George,* 45 Ohio St. 2d 231, 344 N.E. 2d 130 (1976); *City of Dayton ex rel. Scandrick v. McGee,* 67 Ohio St.2d 356, 423 N.E.2d 1095 (1981) (permanent injunction prohibiting entry into contract with arbitrarily favored bidder); *State ex rel. United District Heating, Inc. v. State Office Bldg. Comm.,* 124 Ohio St. 413, 179 N.E. 138 (1931), aff'd on rehearing, 125 Ohio St. 301, 181 N.E. 129 (1932) (writ of mandamus compelling award to lowest bidder). Petitioner has no federal cause of action against the State Officials on procedural due process grounds because Ohio judicial remedies are perfectly adequate and provide all the process that is due. As the Sixth Circuit stated at 847 F.2d 1097, 1103:

> Indeed, there is no claim that the Ohio courts participated with the executive branch to refuse contracts to Republicans. Thus, the Ohio courts

> provide fair and nonarbitrary means of obtaining a remedy, and so provide due process. There is no showing that Ohio courts will deny Lundblad a remedy if he can prove his claim of discrimination based on party affiliation. Thus his procedural due process claim must fail.

(Petition, p. A.32). Petitioner possesses no substantive right which could support a review under the Due Process Clause. Nor can he point to any defect in the Ohio judicial system which could warrant review by this Court. Moreover, none of the substantive due process "assumptions" made by the Sixth Circuit were clearly established in April, 1983. It thus follows that the Sixth Circuit en banc reached the corret conclusion upon narrow grounds and properly limited its review and the scope of its holding to the particular facts at hand. It did not embark on an academic odyssey to explore constitutional matters outside the scope of the pleadings.

CONCLUSION

For the reasons stated above, the Petition for certiorari should be denied.

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